LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 14 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 1263

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES, *Petitioners,*

v.

SABRE SHIPPING CORPORATION, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP A. RYAN
BAKER & MCKENZIE
*Attorneys for Petitioners*
Japan Lines, Ltd.,
Kawasaki Kisen Kaisha, Ltd.,
Mitsui O.S.K. Lines, Ltd.,
Nippon Yusen Kaisha, Ltd.,
and Yamashita-Shinnihon Steamship Company, Ltd.
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

A. VERNON CARNAHAN
DONOVAN LEISURE NEWTON & IRVINE
*Attorneys for Petitioner*
Maritime Company of the Philippines
Two Wall Street
New York, New York

JIRO MURASE
BAKER & MCKENZIE
350 Park Avenue
New York, New York
*Of Counsel*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 8 |
| A. The Decisions of the Court of Appeals and the District Court With Respect to the Primary Jurisdiction of the Federal Maritime Commission Are in Conflict With Applicable Decisions of This Court | 8 |
| B. The Relationship Between Section 15 and Section 18(b)(5) of the Shipping Act, 1916 Presents an Important and Far-Reaching Question of Antitrust Immunity Which This Court Should Resolve in the Public Interest | 16 |
| Conclusion | 24 |
| Appendix A. Opinion of the Court of Appeals for the Second Circuit | 1a |
| Appendix B. Opinion and Order Dated June 12, 1968 of the District Court, Southern District of New York | 1b |
| Appendix C. Order of District Court, Southern District of New York Refusing Certification Under 28 U.S.C. § 1292(b) | 1c |
| Appendix D. Report and Order of the Federal Maritime Commission | 1d |
| Appendix E. Statutes Involved | 1e |

## TABLE OF CITATIONS

CASES: Page

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 ..... 8, 10, 13, 14, 15
Continental Nut Company v. Pacific Coast River Plate Brazil Conference, 9 F.M.C. 563 (1966) ..... 14
Far East Conference v. U. S., 342 U.S. 570 ..... 8, 9, 10, 11, 14, 15
Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 ..... 8, 10, 11, 19
Federal Maritime Commission v. Caragher, 364 F. 2d 709 (2d Cir. 1966) ..... 21
Great Northern Railway Company v. Merchants Elevator Co., 259 U.S. 285 ..... 11
Persian Gulf Outward Freight Conference v. Federal Maritime Commission, 375 F. 2d 335 (C.A.D.C. 1967) ..... 11, 13
U. S. Navigation Co. v. Cunard S. S. Co., 284 U.S. 474 ..... 8, 10, 14, 15

STATUTES:

All Writs Act, 28 U.S.C. § 1651(a) ..... 5
Clayton Act, Sections 4, 12 and 16, 15 U.S.C. §§ 15, 22, and 26 ..... 3
Public Law 87-346 (75 Stat. 762) ..... 19
Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1 and 2 .. 3
Shipping Act, Section 15, 46 U.S.C. § 814 ..... 2, 3, 4, 12, 14, 15, 16, 17, 18, 19, 20, 22, 23
Shipping Act, Section 18(b)(3), 46 U.S.C. § 817(b)(3) 21
Shipping Act, Section 18(b)(5), 46 U.S.C. § 817(b)(5) 2, 4, 5, 6, 7, 8, 11, 12, 16, 17, 18, 19, 20, 21, 22, 23
Shipping Act, Section 18(b)(6), 46 U.S.C. § 817(b)(6) 20
Shipping Act, Section 22, 46 U.S.C. § 821 ..... 5
28 U.S.C. § 1337 ..... 3

MISCELLANEOUS:

Federal Maritime Commission, Rules of Practice and Procedure, Rule 13(g), 46 C.F.R. § 502.227 ..... 6, 13
Index to the Legislative History of Public Law 87-346, Senate Document 100, 87th Congress, 2d Session, dated May 17, 1962 ..... 18, 20, 21, 22

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

---

No.

---

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES, *Petitioners,*

v.

SABRE SHIPPING CORPORATION, *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 14, 1969, refusing to review an order of the United States District Court for the Southern District of New York.

## OPINIONS BELOW

The Opinion of the Court of Appeals appears as Appendix A (p. 1a, *infra*), and is not yet reported.

The Opinion of the United States District Court appears as Appendix B (p. 1b, *infra*), and is reported at 285 F. Supp. 949.

The Report of the Federal Maritime Commission appears as Appendix D (p. 1d, *infra*), and is reported at 9 Pike & Fischer, S.R.R. 760.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 14, 1969 and the order denying the petition for rehearing was entered on February 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

(1) Whether, in a private action under the antitrust laws, a District Court is required, under the doctrine of primary jurisdiction, to refer to the Federal Maritime Commission the question of whether the acts alleged in the complaint were or were not a lawful implementation of agreements theretofore approved by the Commission under Section 15 of The Shipping Act?

(2) Whether the antitrust immunity conferred by Section 15, Shipping Act, 1916, is automatically lost if rates are set contrary to the standards of Section 18(b)(5) of said Act?

## STATUTES INVOLVED

The statutory provisions involved are Sections 15 and 18(b)(5) of The Shipping Act, 1916 (respectively 75 Stat. 763, 46 U.S.C. § 814 and 75 Stat. 764, 46 U.S.C. § 817(b)(5)). They are printed in Appendix D, *infra*.

## STATEMENT OF THE CASE

Petitioners, common carriers by water in foreign commerce, are defendants in a private action under the antitrust laws. The action, commenced by respondent in the United States District Court for the Southern District of New York, seeks the recovery of threefold damages, injunctive relief and attorney's fees. Jurisdiction of the District Court was invoked under Sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22, 26, and under 28 U.S.C. § 1337.

The pertinent facts are not in dispute and are set forth in the opinions of the lower courts. Briefly, respondent in 1961 commenced operating as a common carrier by water in the trade from Hong Kong and Japan to Atlantic and Gulf ports of the United States, and continued to operate from Hong Kong until late 1962 and from Japan until mid-1963 (p. 6b, *infra*). Petitioners and the other common carrier defendants likewise operated in those trades, but, unlike respondent, were associated together under two Conference agreements for the purpose of fixing rates pursuant to Federal Maritime Commission ("Commission") approval under Section 15 of the Shipping Act. Under one Conference, the New York Freight Bureau (Hong Kong), the defendants established rates for cargo originating in Hong Kong; under the other, Japan Atlantic and Gulf Freight Conference, the defendants established rates for cargo originating in Japan (p. 3b, *infra*).

Respondent's complaint, asserting violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), was found by the District Court to predicate liability on two different grounds: (1) that the rates set by

defendants under their Conference agreements were allegedly detrimental to the commerce of the United States within the meaning of Section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(5)); and (2) that the carrier defendants meeting under authority of their Japan Conference agreement allegedly established rates in the Hong Kong trade which were beyond the scope of the Japan agreement (pp. 4-5b, *infra*). As to both theories alleged, the District Court held that "... no immunity from antitrust claims clothed these Conference agreements so as to insulate them from this suit" (p. 16b, *infra*).

Before answer, petitioners moved, *inter alia*, for an order staying the action pending the outcome of proceedings to be commenced by respondent before the Commission. Those proceedings were to determine whether petitioners' alleged conduct was within the scope of agreements to which they were parties and which had theretofore been approved by the Commission under Section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). The District Court, relying upon certain prior Commission proceedings (more fully described hereinafter), held that a reference to the Commission was not required under the primary jurisdiction doctrine and denied the stay.

Following the denial, petitioners applied to the District Court for a certification under 28 U.S.C. § 1292(b) for an appeal from its interlocutory order. This application was denied in a brief order with opinion. Both are printed in Appendix C, p. 1c, *infra*.

Petitioners thereupon petitioned the United States Court of Appeals for the Second Circuit for a writ

of certiorari pursuant to the All Writs Act (28 U.S.C. § 1651(a)) requesting the review and setting aside of so much of the District Court's order as denied the necessity for proceedings before the Commission and a stay based thereon. After ordering the filing of an answer to the petition pursuant to Rule 21 of the Federal Rules of Appellate Procedure but before answer, the Court, in response to respondent's request, held a hearing which it directed be confined exclusively to the question of whether a petition for a writ of certiorari was an appropriate vehicle for securing review of the admittedly interlocutory order of the District Court. Following that hearing the Court denied the petition in the exercise of discretion "without reaching the merits." The Court, however, relying upon the same prior Commission proceedings, approved the District Court's denial of a reference to the Commission (pp. 2-4a, *infra*).

The prior Commission proceeding relied upon by both courts below was an investigatory proceeding commenced by the Commission on December 10, 1962 pursuant to Section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) to determine, *inter alia,* whether it should, pursuant to Section 18(b)(5) of that Act, disapprove any rate in the trade from Hong Kong to Atlantic and Gulf ports of the United States (27 Fed. Reg. 12654 (1962)). Named as respondents in that proceeding were petitioners, the respondent herein, all but one of the other defendants named in respondent's complaint and seven other carriers who were not parties to the Hong Kong Conference but who were engaged as common carriers in transporting cargo from Hong Kong to United States Atlantic and Gulf ports.

The Commission investigation resulted in an initial decision by the Presiding Examiner in April, 1967 in which he concluded, insofar as here material, that the Hong Kong Conference's rates on certain commodities were unreasonably low and detrimental to the commerce of the United States within the meaning of Section 18(b)(5) of the Shipping Act and should be disapproved (pp. 2-5d, *infra*). In response to exceptions by the petitioners and others to the Examiner's conclusions, the Commission, upon review, rendered its report containing its findings of fact and conclusions which, under the Commission's Rules, made the initial decision inoperative (Rule 13(g) Rules of Practice and Procedure, 46 C.F.R. § 502.227). The Commission's Report is reproduced in Appendix D, p. 1d, *infra*.

The Commission's findings as to service to Atlantic and Gulf ports from Hong Kong were that prior to respondent's entry in late 1961 the Hong Kong Conference and one independent carrier had provided such service, and that by the summer of 1962 four additional carriers, three new entrants and one resignee from the Conference, were providing service as independents. The result was that "rates continued to be lowered successively by both independent lines and the conference", and that, following a November 1, 1962 meeting of the Hong Kong Conference, where it was decided that rates should be reduced drastically "to meet competition," the Conference "reduced its rates to a level several dollars below Sabre's rates and approaching the lowest of the independent rates" (p. 4d, *infra*). Having made these findings the Commission, however, concluded that little purpose would be served by disposing of its Section 18(b)(5) investigation on

the merits and it therefore dismissed on the grounds of mootness.[1]

The foregoing are the findings of the Commission which influenced both courts below to conclude that the doctrine of primary jurisdiction did not require a reference to the Commission.

The District Court refused petitioners' request for a stay because it was of the view that the prior Commission proceeding, while not "precisely or technically" deciding whether defendants were participants in any activities not sanctioned by Section 15 of the Shipping Act, did in fact result in a determination that defendants' conduct was not "arguably lawful" under Section 18(b)(5). In addition the District Court found, on the basis of the Commission's disposition of the prior proceeding, that the Commission had made it "quite clear that it will no longer entertain the question" (p. 17b, *infra*).

The Court of Appeals denied the petition for a writ of certiorari on the ground that since the Commission had dismissed the Section 18(b)(5) issues in Docket 1083 as moot, "any use of the expertise of the Commission" had been eliminated. Also the court was of

---

[1] Respondent has petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Commission's disposition asserting that the pendency of its treble damage action required a disposition by the Commission on the merits. Respondent has delayed prosecution of that appeal for a year and one-half and presently seeks to have the Court stay the appeal until after final judgment in the antitrust action. Thus respondent is content to have the Commission's findings accorded finality for the purposes of this action. This proceeding is designated No. 21752, *Sabre Shipping Corporation* v. *Federal Maritime Commission and the United States of America.*

the view that the Commission had had an opportunity to exercise its primary jurisdiction but rejected it. The court did not in terms discuss the interrelationship of Sections 15 and 18(b)(5). (pp. 2-4a, *infra*)

## REASONS FOR GRANTING THE WRIT

### A. The Decisions of the Court of Appeals and the District Court With Respect to the Primary Jurisdiction of the Federal Maritime Commission Are in Conflict With Applicable Decisions of This Court.

This court has made it very plain that where an antitrust complaint, seeking either damages or injunctive relief, alleges violations of the Shipping Act, the doctrine of primary jurisdiction requires that the Federal Maritime Commission in the first instance determine the Shipping Act issues. *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, *Far East Conference* v. *U.S.*, 342 U.S. 570, *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-499, *Carnation Co.* v. *Pacific Westbound Conference*, 383, U.S. 213.

The court has explained the basis of the primary jurisdiction doctrine in *Cunard*, amplified that explanation in *Far East*, reaffirmed it in *Isbrandtsen* and has had occasion to apply the doctrine in *Carnation* (all *supra*).

In *Cunard*, the complaint alleged a combination and conspiracy to drive the plaintiff out of the trade in which both plaintiff and defendant were competing. The alleged conspiracy involved the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agreed to confine their shipment to one of the defendant lines. The alleged purpose of the plan was to coerce shippers

to deal exclusively with the defendants and thus exclude plaintiff from the trade.

After noting that "the Shipping Act covered the dominant facts alleged . . . as constituting a violation of the Antitrust Act" (284 U.S. at 483), the court concluded as follows:

> A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh v. Chicago & N.W.R. Co., supra* (260 U.S. 162, 67 L. ed. 187, 43 S. Ct. 47). The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. 284 U.S. at 485.

In *Far East* the court quoted the above passage in full and then went on to say by way of amplification:

> The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpret-

> ing the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. 342 U.S. at 574-75.

In *Isbrandtsen,* the court reaffirmed the teaching of *Cunard* and *Far East* stating:

> . . . those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed . . . It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation. 356 U.S. at 498.

In *Carnation,* the court held that "the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws". 383 U.S. at 216. And, after noting that the plaintiff's treble damage action was based upon the theory that defendants' rate-making agreements were unlawful *per se* under the antitrust laws, the court expressly allocated to the Commission the question whether or not the defendants' rate-making activities were an implementation of a previously approved agreement. Accordingly, the court remanded the case with instructions to stay the action

pending final outcome of Shipping Act proceedings begun before the Commission.

The foregoing decisions require a reference to the Commission of the issue of the lawfulness, under the Shipping Act, of petitioners' implementation of their approved agreements. See *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 375 F. 2d 335, 339-40 (C.A.D.C. 1967). This issue, which is at the core of respondent's antitrust action, creates numerous "issues of fact not within the conventional experience of judges" and "requiring the exercise of administrative discretion." *Far East Conference* v. *United States,* 342 U.S. 570 at 574. And to the extent that the determination of this issue may conceivably involve an investigation of the reasonableness of rates under Section 18(b)(5), it is beyond dispute that the Commission's expertise must be consulted. This court has said that whenever a rate is attacked as unreasonable, there must be preliminary resort to the agency. *Great Northern Railway Company* v. *Merchants Elevator Co.,* 259 U.S. 285 at 291.

Even viewing the complaint as claiming that the tariff changes were effected with the predatory purpose of driving respondent from the trade, it is clear that the issue of intent is one for the Commission. As to this, the court in *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. at 499, held that "precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute".

Had the complaint in this case been filed prior to any proceedings before the Commission, no one would seriously argue that the doctrine of primary jurisdic-

tion was inapplicable. The mere fact that, prior to the filing of the complaint, the Commission had instituted Docket 1083 to investigate the rates in one of the trades covered by the complaint does not render the doctrine less applicable.[2] Both courts below, however, refused to defer to the Commission because of erroneous views of the significance of the Commission's ultimate holding that the Section 18(b)(5) issues in Docket 1083 were moot.

The District Court was of the view that:

> . . . the *Commission* . . . has decided under Section 18(b)(5) that the acts of the defendants were not "arguably lawful" and the fact that it did not rely on Section 15 does not destroy the finality of that finding. Moreover, the Commission has made it quite clear that it will no longer entertain the question irrespective of what section might be cited to it, for the reason that the rates have become stabilized and, since it has no power over the past, there is nothing further for it to do. (Appendix B, pp. 16-17b, *infra*) (Emphasis supplied)

The fact is that the Commission made no finding that unreasonably low rates had been set contrary to Section 18(b)(5). The Presiding Examiner did find that Section 18(b)(5) had been violated but the Commission did not adopt his finding. Moreover, the Commission's findings (p. 4d, *infra*) that rates had been lowered to meet competition and that the rates did not reach the level of the lowest rates of independent carriers are inconsistent with the District Court's inference that the Commission decided under Section 18(b)

---

[2] Docket 1083 was concerned only with the Hong Kong-U.S. Atlantic and Gulf Trade but the complaint embraces as well the Japan-U.S. Atlantic and Gulf Trade.

(5) that petitioners' acts were not "arguably lawful." The Commission concluded only that "the investigation should be discontinued on the ground it has become moot" (p. 6d, *infra*). By the Commission's own rules, its review of the Presiding Examiner's initial decision made his findings inoperative. Rules of Practice and Procedure, Rule 13(g), 46 C.F.R. 502.227.[3] And it is erroneous to state that the Commission "will no longer entertain the question irrespective of what section might be cited to it." The fact is that the Commission was never asked by respondent to determine whether petitioners' alleged activities exceeded the permissible scope of their approved agreements.[4] This is a question solely for the Commission in the first instance. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. at 224; *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission, supra.*

The Court of Appeals stated its rationale for denying certiorari as follows (p. 3a, *infra*):

> This is no by-passing of the Commission which has already dismissed the proceeding before it, insofar as it concerns the issues in this case, as moot, thus eliminating any use of the expertise of the Commission. An opportunity to exercise its primary jurisdiction has been availed of and rejected by the

---

[3] In refusing certification for an appeal under 28 U.S.C. § 1292(b), the District Court makes the egregious assumption that the "opinion" of the Examiner is binding on the Commission. (p. 1c, *infra.*) This is contrary to Rule 13g: "Upon the filing of exceptions to, or review of, an initial decision, such decision shall become inoperative until the Commission determines the matter."

[4] Docket 1083 was begun by Commission order of December 10, 1962 but respondent did not file the present antitrust complaint until October 29, 1966 when the hearings in Docket 1083 were completed for all practical purposes.

> Commission. The only effect of our granting the writ would be further to postpone the day of reckoning for perhaps another several years until a new proceeding before the Commission finally reached the stage at which the Commission could decide that it meant what it said when it held on November 3, 1967 that the issues were moot because the rates under attack had long since been discontinued. In thus exercising our discretion we do not think we violate any of the principles outlined in *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), *Far East Conference* v. *U.S.*, 342 U.S. 570 (1952), *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and the other cases relied upon by petitioners.

It is apparent that the Court of Appeals, as did the District Court, misapprehend the nature of the prior proceedings and the issues before the Commission. The mootness holding of the Commission did not eliminate the need for its expertise as far as the present complaint is concerned for the simple reason that throughout the entire proceeding in Docket 1083, questions under Section 15 of the Shipping Act were not presented to the Commission for consideration and disposition. Accordingly it is a misapprehension of fact to state that the Commission rejected an opportunity to exercise its primary jurisdiction. It could not reject what was not before it.

Lastly, it is beyond the limits of discretion for the Court of Appeals to predict that upon a proper reference the Commission would do nothing other than reiterate its mootness holding. Given the opportunity, the Commission will decide the issues referred to it as has been its practice in the past. *Continental Nut Company* v. *Pacific Coast River Plate Brazil Confer-*

*ence,* 9 F.M.C. 563 (1966). Indeed, it would have no choice in the matter.

Petitioners submit that in view of this court's decision in *Carnation,* the Court should provide needed guidance in the area of primary jurisdiction. *Carnation* clarified the earlier substantive teachings of *Cunard* and *Far East* and held that the Shipping Act did not provide shipping conferences with an absolute immunity from antitrust liability regardless of whether an agreement had been approved or not, as the latter cases were thought to hold. Rather the court held that "the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws".

In the light of this holding it can realistically be expected that antitrust actions against conferences and carriers will be more common. The instant case may be viewed as typical. Any doubt concerning the proper role of the Commission should be dispelled. Potential plaintiffs and defendants alike need to be apprised of the proper allocation of jurisdiction between courts and Commission in treble damage actions. This is particularly true in the instant case where the proceedings before the Commission lasted almost four years before the antitrust complaint was filed. The efficient administration of justice requires that the antitrust plaintiff who invokes agency jurisdiction in aid of an antitrust claim also assume the responsibility of bringing before the agency all Shipping Act issues required to be resolved by the Commission. Had this course been followed here, the Commission would have had needed guidance and would have decided the Shipping Act issues. Time and effort would have been saved. If such a course is not followed, the antitrust plaintiff can

only blame himself for any delay he experiences in procuring a trial on the merits (if he is entitled to one).[5]

**B. The Relationship Between Section 15 and Section 18(b)(5) of the Shipping Act, 1916 Presents an Important and Far-reaching Question of Antitrust Immunity Which This Court Should Resolve in the Public Interest.**

In refusing to stay proceedings pending a reference of Shipping Act issues to the Commission, the District Court stated that the Commission in Docket 1083, while not "precisely or technically" deciding whether petitioners were participants in activities not sanctioned by Section 15, did in fact decide "under Section 18(b)(5) that the acts of the defendants were not 'arguably lawful' and the fact that it did not rely on Section 15

---

[5] Had the complaint been more timely filed, Docket 1083 could easily have been enlarged to include a Commission determination of the Shipping Act issues. After the conclusion of the proceedings before the Commission and after its complaint was filed, the respondent appealed to the U.S. District Court for the District of Columbia Circuit to have the Commission determine whether Section 18(b)(5) had been violated. At the same time, it strenuously resisted petitioners' application for a stay in the Southern District pending a determination by the Commission whether petitioners were immune from antitrust liability under Section 15. Sabre's insistence on a determination by the Commission under Section 18(b)(5), while avoiding a reference under Section 15 is very difficult to understand. Conceivably respondent may be persuaded that a violation of Section 18(b)(5) by conference members automatically establishes liability under the Sherman Act, a proposition which itself would warrant extended analysis. In any event, the threshold issue is not liability under the Sherman Act but immunity under the Shipping Act. Respondent has now moved in Court of Appeals for the District of Columbia Circuit for a stay pending the outcome of a trial in the Southern District. All these maneuvers would have been unnecessary had respondent promptly invoked the primary jurisdiction of the Commission as *Carnation* requires.

does not destroy the finality of that finding." (pp. 16-17b, *infra*).

A fair reading of the entire opinion makes it plain that both this statement of the District Court and its overall conception of its obligation under the doctrine of primary jurisdiction were at once the product of its view of the substantive interaction of Sections 15 and 18(b)(5). Its holding in this regard, simply stated, is that, although Section 15 permits rates set under an approved agreement to become effective upon filing with the Commission, nonetheless the antitrust immunity conferred by Section 15 is lost if the same rates are later found to contravene the standards of Section 18(b)(5). (pp. 10-13b, *infra*).

This holding, if left to stand, poses a grave threat to the maritime industry. Section 15 invites, indeed encourages, carriers by water to act in concert in setting rates. Because rate setting is admittedly a *per se* violation of the antitrust laws, Section 15 agreements are exempted from their strictures. The holding of the District Court effectively waters down this exemption by exposing the carriers to liability if it is later found that the rates were "so unreasonably high or low as to be detrimental to the commerce of the United States." In effect, the carriers retroactively would lose all immunity from antitrust liability by a later determination that rates, even if set in good faith, offend Section 18(b)(5). They could only set rates under approved agreements at their peril. This is inconsistent with the continued existence and proper functioning of the conference system which Congress obviously wished to preserve. Otherwise no immunity from the antitrust laws of any magnitude would have been granted.

A brief examination of the structure of Section 15 and of the legislative history of that section and Section 18(b)(5) demonstrates the error of the District Court.[6]

Section 15 requires rate setting agreements to be filed with the Commission and makes it unlawful to carry out any agreement in whole or in part before approval or after disapproval by the Commission. However, an exception to the prior approval requirement is provided for rates, fares and charges agreed upon by approved conferences. Such rates become effective upon compliance with the publication and filing requirements of Section 18(b).[7] Neither Section 15 nor any other provision of the Act provides any mechanism for securing prior approval by the Commission. Basic to the regulatory scheme, however, is the Commission's power under Section 15, prospectively, to disapprove, cancel or modify any agreement, whether previously approved by it or not, which is found, after notice and hearing to be unjustly discriminatory, or to operate to the detriment of the commerce of the United States or to be contrary to the public interest or to be in violation of the Act. The Commission, in a word, stands as a monitor; its role is to correct aberrations from the statutory standards when and if they occur; its role is not to sit

---

[6] The Court of Appeals did not pass on the question although it decided, in its discretion, that a reference to the Commission should not be granted.

[7] Both the exception to the prior approval requirement and Section 18(b)(5) were added to the Shipping Act, 1916 by Public Law 87-346, 87th Congress, 1st Sess., October 3, 1961, 75 Stat. 762 et seq. An Index to the Legislative History of Public Law 87-346 is contained in Senate Document No. 100, 87th Congress, 2d Sess., dated May 17, 1962. References to the legislative history hereafter are to pages in the "Index."

in judgment as a permission-giver in the field of international rate making.

Section 18(b)(5) must be read against the background of Section 15. Section 18(b)(5) provides:

> The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Whether Section 18(b)(5) limits the scope of activities permissible under approved Section 15 agreements is a question which this court should decide. Petitioners submit that a sampling of the legislative history of Sections 15 and 18(b)(5) demonstrates that there are no such limitations.

In 1958 Congress commenced an extensive investigation of the shipping industry as a consequence of the Court's holding in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, that the Commission was prohibited from approving a Conference agreement under Section 15 whereby shippers who agreed to use Conference vessels exclusively were to be granted freight rates lower than shippers who did not so agree. The basis of the holding was that the particular agreement, under the circumstances there disclosed, constituted discrimination against a shipper prohibited by Section 14, Third of the Act. The result was the passage by the House of H.R. 6775 as recommended by the Committee on Merchant Marine and Fisheries which, as thereafter amended, ultimately became Public Law 87-346 (75 Stat. 762), effective October 3, 1961, which amended the Shipping Act in several material respects.

As recommended by the House Committee and as passed by the House, H.R. 6775 would have amended Section 15 to provide that the Commission "shall disapprove any conference rate, fare, or charge which after hearing it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States" (Index, p. 105).

The Senate Committee recommended deletion of that amendment. The Committee's report expressed the view that further intrusions into rate-making would be a "serious mistake" constituting an improvident assertion of a right to "sit in judgment of the 'reasonableness' of international ocean freight rates" (Index, p. 224).

On the floor of the Senate, Senator Kefauver offered an amendment to restore Section 15 to the form in which it passed the House insofar as it defined the power of the Commission to disapprove rates (Index, p. 424). The amendment was accepted by Senator Engle and the Senate, following assurances by Senator Kefauver that his amendment was designed to codify existing administrative interpretations of Section 15 and was not designed to authorize rate-setting procedures (Index, p. 424-428).

The Conference Committee recommended deletion of the proposed amendment from Section 15 and recommended that with modification it be enacted as Subdivision (5) of Section 18(b), which pertains generally to tariffs (Index, p. 456). The conferees' proposal was ultimately enacted as Section 18(b)(5).

Section 18(b)(6) provides that anyone who "violates" Section 18 "shall be liable to a penalty of not

more than $1,000 for each day such violation continues." The filing of a rate which the Commission may thereafter disapprove does not, however, constitute a violation of Section 18(b)(5). Section 18(b)(5) is violated only by continuing to charge a rate after Commission disapproval. It was so construed in *Federal Maritime Commission* v. *Caragher,* 364 F. 2d 709, 717-18 (2d Cir. 1966). Indeed Section 18(b)(3) would be violated by charging any rate other than the one filed.

The legislative history of H.R. 6775 further shows that Congress refused to make unlawful the use of Section 15 agreements to lower rates so as to drive non-conference competitors out of business. H.R. 6775 as passed by the House would have amended Section 19 of the Shipping Act to add subdivision (b) thereof, providing as follows:

> (b) it shall be unlawful for any common carrier by water or any conference of carriers, directly or indirectly, to reduce unreasonably its rates or charges for the purpose of destroying competition or eliminating a competitor: PROVIDED, HOWEVER, That nothing contained in the Act shall be construed to prohibit a common carrier by water or a conference of carriers from reducing its rates or charges in good faith to meet competition. Whoever violates any provision of this subsection (b) shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action (Index, p. 109).

The Senate Committee recommended deletion on the grounds of the impropriety of the United States sitting in judgment of international ocean freight rates, a matter over which the Committee felt the United States

should not exercise supervision (Index, p. 225). The Senate Committee's views prevailed, and the Shipping Act was left without a prohibition against reductions in rates for the purpose of driving other carriers out of the trade.

The foregoing brief review of the legislative history of Section 18(b)(5) demonstrates that Congress mandated no criteria for rate fixing conduct by carriers pursuant to Section 15 agreements. The Shipping Act makes lawful the use of Section 15 agreements until disapproval; Section 18(b)(5) does not make unlawful the use of such an agreement to establish a rate which the Commission may thereafter disapprove under that section.

It is important for two reasons that the correct relationship between Sections 15 and 18(b)(5) be declared by this Court.

The first reason is concerned with primary jurisdiction. In the circumstances of this case, there must be a reference to the Commission under controlling precedents of this Court. (Reason A, *supra,* p. 8 *et seq.*) However, unless this Court reviews the District Court's interpretation of Section 18(b)(5), no authoritative guidance will be given to the Commission in an important area involving the administration of the Shipping Act and its relationship to the antitrust laws.

The Commission should be apprised of its proper function upon a reference. That in turn depends upon whether Section 18(b)(5) limits Section 15. If the construction adopted by the District Court is to guide the Commission, it need only determine, in the first

instance, whether the rates failed to meet the standards of Section 18(b)(5). In that event, there would be no need to determine, under Section 15, whether the rate-setting activities exceeded the permissible scope of approved agreements. Only if the rates themselves passed muster under Section 18(b)(5) would an inquiry under Section 15 be necessary to examine the rate-setting activities.

On the other hand, if Section 18(b)(5) in no way imposes limitations on activities permitted under an approved Section 15 agreement, the only question before the Commission would be whether the rate-setting activities—as distinguished from the rates actually set—exceeded the permissible scope of approved Section 15 agreements.

The second reason is concerned with the public interest. Common carriers by water in the foreign commerce of the United States (both conference and non-conference) should be fully apprised of the antitrust significance of Section 18(b)(5). Only then may they proceed intelligently in conducting their operations. Similarly, this Court should provide needed guidance for the lower courts in this important antitrust area.

## CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP A. RYAN
BAKER & MCKENZIE
*Attorneys for Petitioners*
Japan Lines, Ltd.,
Kawasaki Kisen Kaisha, Ltd.,
Mitsui O.S.K. Lines, Ltd.,
Nippon Yusen Kaisha, Ltd.,
and Yamashita-Shinnihon Steamship Company, Ltd.
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

A. VERNON CARNAHAN
DONOVAN LEISURE NEWTON & IRVINE
*Attorneys for Petitioner*
Maritime Company of the Philippines
Two Wall Street
New York, New York 10005

JIRO MURASE
BAKER & MCKENZIE
350 Park Avenue
New York, New York
*Of Counsel*

April 14, 1969

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 153—September Term, 1968.

(Argued November 7, 1968 Decided January 14, 1969.)

Docket No. 32566

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA, LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES, *Petitioners,*

*v.*

SABRE SHIPPING CORPORATION, *Respondent.*

Before: MEDINA, WATERMAN and MOORE, *Circuit Judges.*

---

Petition for a writ of certiorari to review the decision of the District Court of the United States for the Southern District of New York, Sylvester J. Ryan, *Judge,* denying petitioners' motion in a civil antitrust case for a stay and for other relief. Opinion below reported at 285 F. Supp. 949. Under the procedure outlined in Rule 21 of the Federal Rules of Appellate Procedure the petition is denied, without reaching the merits of the attempted interlocutory appeal.

PHILIP A. RYAN, New York, N. Y. (Jiro Murase, Gregor F. Gregorich and Baker & McKenzie, New York, N. Y., on the brief), *for petitioners, Japan Line Ltd., Kawashaki Kisen Kaisha, Ltd., Mitsui O. S. K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., and Yamashita-Shinnihon Steamship Company, Ltd.*

PETER J. GARTLAND, New York, N. Y. (A. Vernon Carnahan and Donavan Leisure Newton & Irvine, New York, N. Y., on the brief), *for petitioner Maritime Company of the Philippines.*

VICTOR S. FRIEDMAN, New York, N. Y. (Leon Silverman, Linda R. Blumkin and Strasser, Spiegelberg, Fried & Frank, New York, N. Y., on the brief), *for respondent.*

JOHN P. MEADE, Washington, D. C. (Leonard G. James, F. Conger Fawcett, and Graham & James, Washington, D. C., on the brief), *for Pacific Coast European Conference, amicus curiae.*

MEDINA, *Circuit Judge*:

There is before us a petition for a writ of certiorari, in a civil antitrust case, to review the interlocutory rulings of Judge Ryan, in the Southern District of New York, denying applications for a stay and for other relief. In the exercise of our discretion we deny the petition, without reaching the merits. See Rule 21 of the Federal Rules of Appellate Procedure. An application for certification under 28 U.S.C., Section 1292(b) was denied by Judge Ryan.

This is an action pursuant to the provisions of Section 4 of the Clayton Act, 15 U.S.C., Section 15, and Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1, 2. The complaint requests a recovery of $49,000,000 in damages, attorneys' fees and injunctive relief. Petitioners, defendants in the action, are members of the Japan Atlantic & Gulf Conference and the New York Freight Bureau (Hong Kong) Conference. Plaintiff Sabre Shipping Corporation is an independent. The gist of the antitrust charge is that prior to 1962 petitioners and other defendants did most of the business of shipping goods in the Hong Kong-United States and Japan-United States trade and commerce, but that plaintiff was a substantial competitor. Thereafter, and as part of an alleged conspiracy, petitioners and others reduced their rates "to an unreasonably low level below the cost of transporting the commodities" and put Sabre out of business, after which the old rates were restored.

Proceedings before the Maritime Commission on Sabre's complaint were begun by order of the Commission on De-

cember 10, 1962, on the charge that the rates above referred to were "so unreasonably low as to be detrimental to the commerce of the United States," in violation of Section 18(b)(5) of the Shipping Act, 46 U.S.C., Section 817(b)(5). There were seemingly interminable delays. The present antitrust case was commenced on October 29, 1966. Finally, the Examiner sustained Sabre's allegations of unreasonably low rates and Judge Ryan commented that the situation was so absurd "that some rates to Atlantic ports from Hong Kong were less than those to the West Coast."

Nevertheless, on November 3, 1967, the Commission held the issue had become moot and ordered the proceedings discontinued insofar as it related to the matters under discussion here. The Commission stated "some useful purpose must be served before the Commission will undertake to examine a carrier's now-defunct rate structure." Sabre's petition to the Commission for reconsideration was denied on January 19, 1968.

In denying the writ in the exercise of our discretion we have taken into consideration all the facts and circumstances set forth in the voluminous papers submitted by petitioners and respondent. We are also mindful of the delays that have already occurred and Judge Ryan's statement that "the time has come for plaintiff to have its day in court on the merits." This is no bypassing of the Commission which has already dismissed the proceeding before it, insofar as it concerns the issues in this case, as moot, thus eliminating any use of the expertise of the Commission. An opportunity to exercise its primary jurisdiction has been availed of and rejected by the Commission. The only effect of our granting the writ would be further to postpone the day of reckoning for perhaps another several years until a new proceeding before the Commission finally reached the stage at which the Commission could decide that it meant what it said when it held on November 3, 1967 that the issues were moot because the rates under

attack had long since been discontinued. In thus exercising our discretion we do not think we violate any of the principles outlined in *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), *Far East Conference* v. *U. S.*, 342 U.S. 570 (1952), *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and the other cases relied upon by petitioners.

The various questions of statutory construction and interpretation were well within Judge Ryan's competency to decide and thus we are faced with no more than another effort to induce us to take cognizance of an interlocutory appeal of which we have no jurisdiction.

We hold that 28 U.S.C., Section 1292(b) does not supplant the All Writs Act. It is our view that in a proper case the mere denial by a District Judge of an application for certification under 28 U.S.C., Section 1292(b) does not preclude our consideration of a petition for any of the traditional writs. See *D'Ippolito* v. *Cities Service Company*, 374 F. 2d 643 (2d Cir. 1967).

The various miscellaneous alleged erroneous rulings by Judge Ryan in his opinion below may be reviewed on an appeal from a final judgment in this case, as in others.

Petition for writ of certiorari denied.

---

MOORE, *Circuit Judge* (concurring):

Would that the issues were as simple as plaintiff (respondent herein), Judge Ryan, and the majority would have them. Briefly summarized, these defendants (petitioners herein) combined and conspired to put plaintiff out of the shipping business by reducing their rates below cost until plaintiff was forced to leave the trade and then, after plaintiff had been eliminated, restored their pre-existing profitable rates. Were this all there is to the situation, a better

case of unprincipled conduct could not be pleaded. But legal problems are rarely so simple—and are not so here.

The only question before us is whether an interlocutory review of the primary jurisdiction issue should be entertained at this stage of the litigation. Although benefits may often accrue to a complicated litigation by a decision on points of law which might remove many issues from, and thus materially shorten, the controversy, there must be reasonable assurance that such a benefit would result from an interlocutory review.

Petitioners argue, in effect, that the Commission has primary jurisdiction to decide whether their rates set by agreement were set so unreasonably low as to be illegal and that such a determination by the Commission is vital to a decision that they are beyond the immunity of the antitrust laws extended by Section 15.

Respondent replies that it is not a question of sending the problem to the Commission and (by stay) awaiting their answer but that "the principal issue now before the District Court has already been considered at length by the very agency [the Commission] to which defendants now seek a reference of this case" (Respt's Br. p. 16).

This court is in no position at this time to pass on the merits, procedurally or substantively, of the prior proceedings before the Commission. An investigation was apparently commenced before the Commission in December 1962, (Docket 1083), a decision rendered by a hearing examiner in April 1967, and a report of the Commission issued in November 1967. Petitioners claim that "the Commission found that the rate reductions effected by the Freight Bureau (1) were based upon a decision 'to meet competition'; (2) were intended to take into account rebates being paid to shippers by non-conference carriers; and (3) were never, in fact, lower than, and indeed approached only the lowest published rates for, independent carriers. Hav-

ing made these findings, the Commission concluded that little purpose would be served by deciding this aspect of its investigation on the merits and, hence, dismissed the Section 18(b)(5) inquiry on the grounds of mootness." Petitioners will be able to urge these findings for whatever legal effect they may have in future proceedings (Pet. p. 7). Subsequent thereto, respondent sought an order from the Court of Appeals (D. C. Cir.) remanding the case to the Commission "for a decision as to whether the rates in question violated Section 18(b)(5) of the Shipping Act." Because of the pendency of this antitrust action, respondent indicated that a decision by the Commission would be helpful in that action. The petitioners here have intervened in the D. C. Circuit proceeding. No decision has as yet been rendered therein.

It is difficult to perceive how a stay of this litigation would "materially advance the ultimate termination of the litigation." The effect of the previous proceedings and the decision of the Commission can be argued upon the trial. If immunity from the antitrust laws results, this can be so declared by the trial court. If further declarations from the Commission are to be forthcoming as a consequence of such decision as may be rendered by the Court of Appeals (D. C. Cir.) in the proceeding now before it, the effect thereof on antitrust immunity can be urged upon the trial.

By being denied an interlocutory appeal at this time, petitioners lose none of their rights to raise all relevant questions upon the ultimate appeal, including their primary jurisdiction points. They do lose a present declaration from us of antitrust immunity but the record not yet made is scarcely sufficient for such a premature pronouncement one way or the other. Accordingly, I would deny the petition.

## APPENDIX B

### Opinion and Order of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
S. D. NEW YORK

No. 66 Civ. 3617

June 12, 1968

SABRE SHIPPING CORPORATION, *Plaintiff*

v.

AMERICAN PRESIDENT LINES, LTD., ET AL., *Defendants.*

Strasser, Spiegelberg, Fried & Frank, New York City, for plaintiff (Leon Silverman, Victor S. Friedman, Allen Isaacson and Kenneth Lipper, New York City, of counsel).

Baker & McKenzie, New York City, for defendants Japan Line, Ltd., Kawasaki Kisen Kaisha Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., Yamashita-Shinnihon Steamship Co., Ltd. (Andreas F. Lowenfeld, New York City, of counsel).

Donovan, Leisure, Newton & Irvine, New York City, (A. Vernon Carnahan, Peter J. Gartland and John H. Wilkinson, New York City, of counsel) for defendant Maritime Co. of The Philippines.

Hill, Betts, Yamaoka, Freehill & Longcope, New York City, for defendants American Mail Line, Ltd., Java Pacific & Hoegh Lines, Klaveness Line, Knutsen Line, Pacific Far East Lines, Inc.

Kirlin, Campbell & Keating, New York City, for defendant P & O Orient Lines.

OPINION

RYAN, District Judge:

In this suit brought under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover damages for violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2), defendants have moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6), F.R.Civ.P., or to dismiss or stay further proceedings in the suit pending the final determination by the Federal Maritime Commission of matters allegedly within its exclusive primary jurisdiction, and in the alternative, the Japanese shipping company defendants have moved for summary judgment.

The moving defendants are MARITIME COMPANY OF THE PHILIPPINES, a corporation engaged in the shipping business organized under the laws of the Philippines, and the five largest Japanese shipping companies organized under the laws of Japan. All the defendants, with one exception, are members of the Japan Atlantic & Gulf Conference and New York Freight Bureau (Hong Kong) Conference, and all have an agent and place of business in this jurisdiction.

Prior to 1962, these two conferences carried the vast majority of all goods shipped in these two trades and during that same period plaintiff was their most significant competition, carrying as it did, 15% to 20% of the total cargo in these trades and accounting for 80% of its business.

The suit was filed on October 29, 1966 against 37 shipping lines, members and associate members of two conferences, and against the two Conferences. The suit has been discontinued against the Conferences and most of the shipping companies.

The complaint charges that, beginning in 1962 and continuing through 1963, the defendants engaged in a combina-

tion and conspiracy to unreasonably restrain and monopolize the Hong Kong-United States and Japan-United States trade and commerce; that the object of the conspiracy was to drive plaintiff, a New York independent shipping line not a member of the conference engaged in transporting cargo by water in both trades, out of these trades; that the conspiracy succeeded in forcing plaintiff out of business and into Chapter XI arrangement proceedings, thus eliminating competition and enabling defendants to gain a monopoly over these trades. The means utilized by defendants to accomplish this is charged to be the lowering of rates in the Hong Kong-United States trade to an unreasonably low level below the actual cost of transporting the commodities. The reduction of these rates, the complaint charges, was effected by the two Conferences purporting to act under existing Conference Agreements Nos. 5700 and 3103, which had been approved by the predecessor agency to the Federal Maritime Commission. Under these agreements, the members are, under prescribed circumstances, permitted to establish and fix uniform rates as among themselves for the particular trade to which the conference relates: Conference Agreement No. 5700 could fix rates for the Hong Kong trade only and Conference Agreement No. 3103 for the Japan trade only.

It is further charged in the complaint that, in violation of the Shipping Act and their Conference Agreements, the members of both Conferences, purporting to act under their respective agreements, met and agreed to and did lower rates for both trades, and that, when this proved unsuccessful, they achieved further rate reductions in these two trades by agreement of the members of the Japan Conference alone, which agreement was wholly illegal because it was outside the scope of its Conference Agreement No. 3103 which, as pointed out, permitted it to fix rates for the Japan trade only. Following the elimination of competition, the defendants are charged with raising the rates to

their earlier level and denying United States importers and exporters the benefits of free competition.

All the agreements, it is finally charged, are outside the scope and protection of the Shipping Act (46 U.S. C.A. § 801 et seq.) because they violate Section 18(b)(5) of the Act in that they are detrimental to United States commerce and trade and in violation of the antitrust laws.

Plaintiff seeks damages and an injunction enjoining defendants from attempting to drive plaintiff out of the shipping business involving United States commerce and enjoining defendants from instituting rate changes without first obtaining a determination from the Federal Maritime Commission that such rate changes are not detrimental to United States commerce.

Although plaintiff alleges that, during all times relevant to the allegations of the complaint, the members of the Freight Bureau and The Japan Conference purported to act pursuant to existing Conference agreements, respectively FMB Nos. 5700 and 3103, approved by a predecessor agency of the Commission, the complaint really proceeds on two theories.

One is that there was a combination and conspiracy among defendants not sanctioned by any agreement approved by the Federal Maritime Commission. This is based upon the charge that defendants met in Kyoto, Japan, from October 29-November 1, 1962 under authority of their Japan Conference Agreement and allegedly agreed to effectuate reductions in the rates for the transportation of cargo from Hong Kong. Plaintiff asserts that those agreements were "wholly illegal because *inter alia* outside the scope of" the Japan Conference and because that agreement did not authorize defendants to fix rates for cargo originating in Hong Kong.

The second theory is that the rates fixed by defendants subsequent to November 1, 1962 were "wholly illegal because detrimental to the commerce of the United States and thus outside the scope and protection of the Shipping Act". Though admitting that the Freight Bureau and Japan Conference Agreements permit the parties to fix rates, plaintiff claims that the rates permitted by those agreements "may not, under the specific provisions of Section 18(b)(5) of the Shipping Act of 1916, as amended, 46 U.S.C. Section 817(b)(5), be so unreasonably low as to be detrimental to the commerce of the United States."

In support of their motions, defendants urge that this Court lacks jurisdiction because their rate agreements are exempt from the antitrust laws under the Shipping Act, Section 15; that whether they acted outside their agreements presents a question for the primary jurisdiction of the Commission, and that the antitrust laws do not extend to international ocean transportation unless the restraints complained of were effected within the United States and directly affected American shipping—that is, outbound trades. As a last moment argument, Japanese shipping defendants urge that summary judgment is proper as to them because they acted pursuant to sovereign directive.

All defendants, in the alternative, urge this Court to stay its hand, if it finds it has jurisdiction, until the Commission has rendered its decision in a proceeding brought by plaintiff to determine whether the rates charged in the Hong Kong trade are so unreasonably low as to be in violation of Section 18(b)(5) of the Shipping Act, and defendants charged rates other than those on file in violation of Section 18(b)(3) of the Shipping Act, and whether they violated Sections 14, 16, or 17 of the Act.

The facts as disclosed in the affidavit and exhibits of plaintiff's president, and not contradicted by defendants, briefly stated are:[1]

Defendants, in the conduct of their operations between Hong Kong, Japan and the United States, maintain business offices in the United States and arrange in the United States for the shipment of cargo both inbound and outbound.

Plaintiff, who was in the shipping business since 1958, entered this trade in 1961. It operated in competition with defendants as a time charterer. To meet plaintiff's competition, defendants invited it to join the New York Freight Bureau. This offer plaintiff rejected. It continued so successfully to compete with defendants that on November 9, 1962, defendants, finding themselves unsuccessful in their efforts to drive plaintiff out of the field, lowered their Hong Kong rates to a non-remunerative level. On that same day, plaintiff complained to the Commission that these rates were in violation of the Shipping Act and it left the Hong Kong trade. Plaintiff left the Japan trade late in mid-1963.

After SABRE had left the trade and the competition it presented had been removed, both Conferences promptly

---

[1] The motion brought by the PHILIPPINE Company is supported only by an affidavit of counsel to which are attached copies of the two shipping conference agreements on file with the Commission. The motion raises no factual issues.

The motion of the Japanese defendants is based on nine affidavits of their respective corporate officers. The affidavits all state that the action of the Japanese lines in lowering and raising rates was taken at the direction of the Ministry of Transport of Japan, by whom they are subsidized.

Plaintiff's president has submitted an affidavit setting forth the facts leading up to this suit, as well as the decision of the Hearing Examiner of the Maritime Commission in Proceeding No. 1083, Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 9 Pike & Fischer Ship. Reg. Rep. 106 (4/20/67).

raised their rates to the pre-reduction level, which at present exceed the rates which had been fixed by plaintiff.

SABRE was forced into Chapter X proceedings under the Bankruptcy Act. It has paid 100% of its creditors' claims and is prepared to resume shipping.

Proceedings on the complaint of SABRE were begun by order of the Commission of December 10, 1962, to determine whether the Commission should disapprove any rate in the Hong Kong trade fixed by the New York Freight Bureau "as being so unreasonably low as to be detrimental to the commerce of the United States" in violation of Section 18(b)(5) of the Shipping Act. It was found that the Conference rates in effect on November 9, 1962 were 20% below plaintiff's rates and 34% below their own existing rates and 47.5% below those quoted at the beginning of 1962.

On June 20, 1963, the investigation was expanded to include a determination as to whether the respondents were engaging in practices in violation of Sections 14, 16 or 17 of the Shipping Act, "or which may result in the charging of lower rates than those on file with the Commission in violation of Section 18(b)(3) of the Act."

The Examiner found that for seven years and until 1962, the carrier rates in the Hong Kong trade had remained stable, and that then non-conference competition grew so intense that on August 30, 1962, the Conference reduced its rates on the commodities being carried by several non-conference carriers. The Examiner also found that the rate cutting problem came to a critical pass and that there were other equally unlawful practices employed—such as rebates, the charging of rates below those filed, and the use by conference shippers under other names of non-conference lines.

It was specifically found that the Japan Conference had held a meeting in Japan on November 1, 1962 at which it had agreed to reduce its rates to non-conference rates; that

this was the reduction which prompted the complaint by plaintiff to the Commission; and that a further reduction was made by the Conference on December 3, 1962 at which point defendants' rates were 20% below the rates charged by SABRE, which had remained constant, and an average of 16% below those of the lowest non-conference carriers; that in a single round the Conference had reduced its rates an average of 34% that this "was no ordinary competition and that the Conference was indeed out for blood." (Examiner's Report, p. 18)

The absurdity of this action, it was noted, was that some rates to Atlantic ports from Hong Kong were less than those to the West Coast.

The Examiner found that these rate reductions were the principal causes for SABRE's leaving the Hong Kong and Japan trade. From this and from the almost immediate raising of rates which followed plaintiff's departure and which continued through 1967, he concluded that the rates fixed by defendants in 1962 were so unreasonably low as to stifle competition and be detrimental to the commerce of the United States and, therefore, unlawful under Section 18(b)(5) of the Shipping Act; that no unlawful intent was required; and that the Commission had no alternative but to disapprove such rates.

The Examiner also found that defendants had used every means to avoid simplifying or expediting the Commission proceedings and that their tactics were "a complete manual on dilatory procedures." (p. 24) He found them to have violated Sections 16 and 17 of the Shipping Act, in that they had discriminated against shippers, but not of violating Section 18(b)(3), charging rates other than those on file. He refused to entertain a proceeding under Section 15 in order to determine whether the Freight Bureau's Conference Agreement No. 5700 should be disapproved, as not within the scope of the proceedings.

The Examiner's conclusion that the Freight Bureau's tariff for certain commodities was unreasonably low was excepted to by respondents—the defendants in this action—as being moot.

At the time of the making of these motions now before us, the Commission proceedings which had been pending for five years had not been terminated. The Commission on November 3, 1967, ordered their discontinuance "on the ground of mootness, where more than five years have elapsed since the questioned rates were in effect and where relatively stable conditions have returned to the trade." But, plaintiff has not returned to the trade!

A petition filed by plaintiff for reconsideration of the Commission's decision (in which defendants refused to join) was denied on January 19, 1968. Plaintiff has appealed from that decision to the United States Court of Appeals for the District of Columbia Circuit, and the defendants have petitioned for leave to intervene.

At the outset, we dispose of the defendants' challenge to this Court's jurisdiction.

The antitrust laws of this country extend to any activity (unless plainly and clearly exempted by statute), whether carried on by a foreigner or a citizen, which affects the trade and the commerce of the United States; and this is so irrespective of the citizenship of the actor and the place where the activity took place (United States v. Alcoa, 2 Cir., 148 F.2d 416). "The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce?" (United States v. Hamburg Amerikanische, C.C., 200 F. 806, at p. 807.)

The technicality of which way the commerce may be moving is immaterial. The contention of the defendants is particularly fallacious since in making their plea for immunity under the Shipping Act, the defendants do so on

the basis of exposure to antitrust liability. Besides, the foreign defendants, by joining with American shippers under the Conference, voluntarily submit themselves to the jurisdiction of United States law. (See In re Grand Jury Investigation of the Shipping Industry, 186 F.S. 298).

As for the Japanese defendants, whether the alleged unlawful activities were engaged in at the direction of the Government (and the facts point otherwise) is a matter for defense, which even if established in their favor would not necessarily immunize them from prosecution or civil responsibility for acts done in United States commerce.

We come now to the defendants' argument that the Shipping Act grants the defendants complete immunity from antitrust laws when acting under an approved Conference agreement.

Section 15 of the Shipping Act, after directing the filing of all agreements including conferences' "fixing rates or controlling, regulating, preventing or destroying competition", provides that the Commission after notice and hearing may disapprove or cancel any agreement, whether or not previously approved by it that it finds to be "unjustly discriminatory or unfair * * * or to operate to the detriment of the commerce of the United States or to be contrary to the public interest or to be in violation of this chapter * * *"; that such agreements not approved "shall be lawfully only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *".

The only exception to the approval requirements off Section 15 is that tariff rates, fare and charges agreed upon by approved conferences, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of Section 18(b).

It is only "agreements, modifications or cancellations lawful" under Section 15 which are exempt from the antitrust laws (46 U.S.C. § 814).

As alleged in the complaint, there is no question that the two Conference Agreements in suit come within the exception requiring no prior approval "if otherwise in accordance with law."

Section 18(b)(5), after directing the carriers to file and publish their tariffs and prohibiting them from charging other than the filed rates provides that:

> "The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." (46 U.S.C. § 817(b)(5).)

This is the statute which the Hearing Examiner found had been violated by defendants.

The argument of defendants by reason of the Shipping Act runs thus: that the lawfulness of conference rates is a matter exclusively within the jurisdiction and competence of the Commission and that once the agreement fixing rates has been approved by the Commission the Conference rates are exempt from the antitrust laws until disapproved; that defendants have the lawful right under Section 15 to establish rates fixed by Conferences without prior approval of the Commission and that, even if these rates are subsequently held to be detrimental to commerce under Section 18(b)(5) as unreasonably low, defendants have immunity for their past activities.

The defendants continue in this contention that this antitrust immunity granted by Section 15 is not conditioned or limited upon a finding under Section 18(b)(5) that the rates are not detrimental to commerce and reason that this is

clear from the language of Section 15 as well as from its purpose which is to permit defendants to control or limit competition by making it lawful for them to jointly fix rates and put them into effect without prior approval. The fact that they are permitted to do so immediately, they say, cannot mean that they run the risk of being prosecuted later for antitrust violations should the rates be found unreasonably low under Section 18(b)(5). In short, defendants urge that the Shipping Act makes lawful the use of Section 15 agreements until disapproval and that Section 18(b)(5) does not make unlawful the use of such agreements which the Commission may thereafter disapprove under the criteria there applicable.

The complaint, therefore, they say, fails to state a claim because by its terms Section 18(b)(5) affords no remedy to plaintiff even if the rates are found to be detrimental to commerce; and the only penalties provided to be imposed upon a carrier is that it will not be permitted to charge the rate after Commission disapproval and that it is liable to a fine for every day it does so.

Defendants' argument in substance is that because under Section 15 they may make effective filed rates prior to approval, this means that at the time of the filing the rates are clothed with immunity under the antitrust laws without more—until that immunity is removed by the Commission finding that it does not exist.

Defendants would eliminate Section 18(b)(5) from the Shipping Act as a weapon to control the use of predatory rate-fixing practices. A predatory rate cut could be made in order to drive out a troublesome competitor, the resulting Commission investigation could be stalled (as it was here for 5 years) and, once the competitor was eliminated, the disputed rates could be raised in any amount and the Commission proceeding would be mooted, as was done here.

This, as plaintiff points out, is not the law so long as the antitrust laws are held to apply to maritime proceedings.

The mere fact that agreements setting rates are permitted to take effect prior to approval, does not mean that irrespective of their effect on the commerce of the United States they may be enjoyed until the defendants are caught, only to be released from all past liability simply by discontinuing those rates. If this were the law, antitrust limitations on rate agreements, which are price fixing agreements and per se antitrust violations, would be non-existent and the shippers would enjoy an extraordinarily privileged status.

That the rates may take effect upon filing does not make them "Lawful under this section" for purposes of immunity. Certainly, this is evident in that Section 15 immunizes only those agreements which are "lawful under this section, or permitted under section 813a."

Section 813a permits dual rate contracts "after notice and hearing * * * unless the Commission finds that the contract * * * will be detrimental to commerce * * * or contrary to the public interest." If dual rates under Section 813a are immunized by Section 15 only if they meet Section 813a's standards, certainly those "lawful under this section" must meet the same standard. Nor does defendants' argument that the shippers, while being told that they may safely put into effect their rates without prior approval, should not run the risk of having them exposed to antitrust prosecution, move this Court. That is a risk that any person in business affecting commerce takes. The argument comes poorly from the mouth of these defendants who, because of the Government's interest in the stability of shipping, are permitted to do things which the ordinary businessman is prohibited from doing. That something more than filing is necessary before defendants may obtain immunity is clear. "The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited

by § 15. The creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.", said the Supreme Court in that landmark case decided February, 1966, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216, of the precise question under consideration.

The Supreme Court even more recently has made this clear in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 273-274, decided March 6, 1968:

> "Antitrust exemption results not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under § 15 to consider antitrust implications."

The Court cited Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, a decision rendered on the same day, which drastically narrowed the immunity granted under Section 15. The Commission there disapproved two conference agreements because it found that their provisions would be held illegal under the antitrust laws and respondents had failed to satisfy the Commission that they were necessary to further some legitimate interest. The Commission had formulated and applied a rule "that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences 'can bring forth such facts as would demonstrate that the * * * rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.'" The agreements under consideration were (1) a tying rule which prohibited travel agents from booking passage on competing individual lines and (2) required unanimous conference action for charging Commission rates. The Court rejected respondents' argument that the

whole purpose of the statutory scheme behind the Shipping Act would be defeated if incompatibility with the antitrust laws could be sufficient to deny immunity. It approved the Commission's ruling that the burden was on the respondents, once the antitrust violation was established (i.e., the restriction on booking on non-conference competing lines), of coming forward with a justification for the antitrust restraint. It did this by equating the antitrust violation with being "contrary to the public interest" and so justifying denial of approval under Section 15, unless some paramount commercial objective could be established to justify such restraint.

> "* * * once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." (390 U.S. p. 245)

In the face of the Commission's finding that the conference rates fixed by the defendants here were so unreasonably low as "to stifle competition and be detrimental to competition", the rate fixing as effected by defendants' agreements, even if submitted under Section 15, could not lawfully have received immunity under the Supreme Court's ruling.

These two latest decisions of the Supreme Court evidence a growing reluctance on the part of the Commission to grant immunity under the Shipping Act, where to do so will grant immunity for an antitrust violation. Mr. Justice Harlan pointed this out in his concurring opinion in *Svenska* where he said that he could not agree with the Court's relating the "contrary to the public interest" standard of Section 15 to the antitrust factors alone and not to shipping industry factors as well. Mr. Justice Harlan also disapproved of the Commission's placing the burden of justifying the agreement on the Conference, he being of the opinion that this should not happen at least until the Commission had

found that "in light of both shipping and antitrust factors the agreement would be contrary to the public interest."

We hold that no immunity from antitrust claims clothed these conference agreements so as to insulate them from this suit. On this ground, the complaint may not be dismissed.

The complaint, as understood by defendants, also pleads the fixing of rates by a third illegal agreement which was not on file with the Commission, the agreement by which the Japan Conference fixed the rates for the Hong Kong trade. On that theory alone, the complaint would have to stand, since even defendants do not argue that a rate which has never been filed could be exempt from antitrust stricture until disapproved.

Moreover, liberally construed, the complaint might be said to plead a violation of Sections 14(2) and (3) of the Shipping Act—"fighting ships" and predatory rate cutting which cannot be immunized by the Commission from the antitrust laws under Section 15.

Then, we consider defendants' plea for a stay pending further possible Commission action at plaintiff's request on Section 15 since there is no longer anything pending before it. Defendants argue that since the complaint pleads the existence of a third illegal agreement outside of the two filed Conference Agreements, there is a threshold jurisdictional question presented for Commission decision of possible violation of Section 15, citing Carnation Co. v. Pacific Westbound Conference, supra. In *Carnation,* the Court did approve the stay of court proceedings pending a determination by the Commission of whether the defendants had unlawfully implemented an approved agreement so that in effect they were acting under unapproved agreements. (United States Navigation Co. v. Cunard SS Co., 284 U.S. 474, and Far East Conference v. United States, 342 U.S. 570.)

Even if the Commission did not precisely or technically decide whether there was such an agreement or that it was

unlawful under Section 15,[2] it has decided under Section 18(b)(5) that the acts of the defendants were not "arguably lawful" and the fact that it did not rely on Section 15 does not destroy the finality of that finding. Moreover, the Commission has made quite clear that it will no longer entertain the question, irrespective of what section might be cited to it, for the reason that the rates have become stabilized and, since it has no power over the past, there is nothing further for it to do.[3]

The purpose of the stay, as *Carnation* emphasizes, is not immunity from antitrust prosecution but the avoidance of a possible conflict while the Commission is acting on the matter which is also before the Court. No such possibility exists here for the Commission has completed its action; "this particular procedural problem has become moot." "The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act." (*Carnation*, supra, 383 U.S. p. 224) See also Allied Air Freight v. Pan Am., 2nd Cir., April 25, 1968, 393 F.2d 441.

The motion for a stay and all other motions are denied.

So ordered.

---

[2] The Examiner alluded to the allegation that there was an unfiled inter-conference agreement between the New York Freight Bureau (Hong Kong) and the Japan-Atlantic and Gulf Freight Conference, and stated:

> "In the first place, these allegations are not within the scope of this proceeding. The Commission's order of investigation, as twice amended, refers to Sections 14, 16, 17, 18(b) (3) and 18(b) (5) but not to Section 15. * * * Nor is there any showing that the actions taken in apparent concert with the other conference were attributable to anything other than the fact that their memberships were virtually identical and that both trades were served by the same non-conference carriers."

[3] The Commission relied for its mootness holding on Cargo to Adriatic, Black Sea and Levant Ports, 2 U.S.M.C. 342 (1940), a Section 15 proceeding.

## APPENDIX C

**Order of District Court Southern District of New York Refusing Certification Under 28 U.S.C. § 1292(b)**

SABRE SHIPPING CORPORATION

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

ENDORSEMENT

66 Civ. 3617

Defendants, by order to show cause, have made this application for an order, pursuant to Title 28, U.S.C., Section 1292(b), amending the order of this Court of June 12, 1968, denying defendants' motion to dismiss or stay this action pending an initial determination by the Federal Maritime Commission of matters asserted to be within the exclusive primary jurisdiction of said Commission.

I find that there is no difference of opinion at all on the question of primary jurisdiction, for the reason that primary jurisdiction with its legal significance arises only where there is a possibility of conflict of result between the Commission and the Court. Here there is no such possibility because (1) the Commission has declined to act over the actions which form the essence of the antitrust violations claimed; (2) even if it did agree to act, the opinion of the Examiner, which became moot with the passage of time but which was not reversed, precludes the immunization of these actions under Section 15, the only possible source of conflict as far as injunctive relief is concerned; and (3) the Commission under its recent rulings approved by the Supreme Court would not approve and, therefore, would not immunize the type of conduct complained of, found to have existed by the Examiner and not disputed, and even in the unlikely event that it did approve it for the

future, this would not conflict with plaintiff's claim for damages in court.

Finally, I am convinced that an intermediate appeal would only serve to further delay this all too long delayed suit and that the time has come for plaintiff to have its day in court on the merits.

The motion is denied. So ordered.

SYLVESTER J. RYAN
*U.S.D.J.*

Dated: July 1, 1968.

## APPENDIX D

### Report and Order of Federal Maritime Commission

DOCKET No. 1083 [1]

INVESTIGATION OF RATES IN THE
HONG KONG-UNITED STATES ATLANTIC AND GULF TRADE

---

REPORT

BY THE COMMISSION: (John Harllee, Chairman; George H. Hearn, Vice Chairman; Ashton C. Barrett, James V. Day, James F. Fanseen, Commissioners)

This investigation was instituted by order of the Commission served on December 10, 1962. The original purpose of the proceeding was to determine whether the Commission should disapprove any rate in the trade from Hong Kong to United States Atlantic and Gulf ports as being so low as to be detrimental to the commerce of the United States under the authority of section 18(b)(5) of the Shipping Act, 1916. The scope of the investigation was subsequently expanded by order served June 20, 1963, to include a determination of whether any respondents had violated sections 14, 16, 17 or 18(b)(3) of the Act. Hearings were held before John Marshall, presiding examiner, in January 1963, April, May, June and July

---

[1] Docket No. 1122, a complaint proceeding instituted by American Export Lines, Inc. against Thai Lines, Ltd., and ninety special docket applications (Nos. 269-281, 283-289, 291-311 and 314-363) requesting that Thai Lines, Ltd. be authorized to pay reparations for certain overcharges and to waive the collection of certain undercharges, were consolidated with this investigation. Docket No. 1122 was subsequently dismissed by order of the Commission dated May 15, 1964, and the special docket applications were denied by Commission report and order served November 12, 1965.

1964, and November 1966.[2] The examiner's initial decision was served on April 20, 1967. Oral argument on the parties' exceptions was held on August 2, 1967.

## Facts

Prior to 1962, the inbound trade between Hong Kong and United States ports on the Atlantic and Gulf coasts was served by the members of the New York Freight Bureau (Hong Kong) and a single, nonconference carrier, Isbrandtsen Steamship Co.[3] Between 1955 and 1962, the rates in this trade were relatively stable. During this same period, however, the volume of cargo increased by 900%.

During 1962, four commodities constituted more than 70% of the cargo lifted at Hong Kong. These were: artificial flowers, footwear, toys, and cotton goods (generally classified for tariff purposes as either piece goods or manufactured goods). Most of the cargo in this trade was discharged at New York.

The conference employed an approved dual rate system and the contract rate on the four commodities under consideration was generally about 15% below the noncontract rate. Isbrandtsen's rates were about 13% below the conference contract rates.

Late in 1961, Sabre Line entered the trade as an independent carrier and instituted rates which, with the exception of footwear, were equal to or less than Isbrandtsen. Soon thereafter, Zim Israel entered the trade and published rates on artificial flowers, toys and footwear which were slightly below Sabre's. On January 15, 1962,

---

[2] Conclusion of the hearings was delayed until November of 1966 pending court enforcement of certain subpoenas duces tecum. *F.M.C.* v. *Caragher,* 364 F. 2d 709 (2nd Cir. 1966).

[3] Isbrandtsen subsequently became a division of American Export Lines, Inc., which has since been renamed American Export Isbrandtsen Lines, Inc.

Isbrandtsen lowered its rates on footwear and a month later on cotton goods.

In March 1962, Orient Overseas Line became the fourth independent line in the trade. It set its rates at about the same level as the other independents.

Successive rate decreases followed both by the independents and by the conference.

During the summer of 1962, three additional independent lines entered the trade. They were Eddie Steamship Co., Ltd., China Union Lines, Ltd. and Thai Lines, Ltd. Waterman Steamship Co. resigned from the conference and began operations as an independent. (Later it rejoined the conference and several months thereafter withdrew entirely from the trade.)

Rates continued to be lowered successively by both the independent lines and the conference.

The following table shows these reductions for the year 1962 and some of the increases in rates since.

RATE REDUCTIONS IN HONG KONG-U.S. ATLANTIC AND GULF TRADE

| | Artificial Flowers | | Cotton Mfg. Goods | | Cotton Piece Goods | | Footwear | | Toys | |
|---|---|---|---|---|---|---|---|---|---|---|
| 1962 | NYFB[4] | Indep.[5] | NYFB | Indep. | NYFB | Indep. | NYFB | Indep. | NYFB | Indep. |
| Jan. | 32.25 | 27.75 | 45.75 | 38.00 | 40.50 | 28.00 | 39.50 | 32.00 | 35.00 | 31.50 |
| Feb. | ,, | ,, | ,, | ,, | ,, | 22.00 | ,, | ,, | ,, | ,, |
| March | 30.00 | 27.50 | ,, | ,, | ,, | 21.50 | 35.50 | ,, | 32.00 | 30.00 |
| April | ,, | 24.00 | ,, | ,, | ,, | ,, | ,, | 31.00 | ,, | 28.00 |
| May | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, |
| June | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, |
| July | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, | 27.50 |
| Aug. | 24.00 | 23.50 | 37.00 | 36.00 | ,, | ,, | 27.00 | 27.00 | 28.00 | ,, |
| Sept. | ,, | 22.00 | ,, | 30.00 | ,, | 20.00 | ,, | ,, | ,, | 24.00 |
| Oct. | ,, | ,, | ,, | ,, | ,, | ,, | ,, | 24.00 | ,, | 23.50 |
| Nov. | 18.00 | 16.50 | 25.00 | 22.50 | ,, | ,, | 20.00 | 18.00 | 20.00 | 18.00 |
| Dec. | ,, | ,, | ,, | ,, | 18.00 | 18.00 | ,, | ,, | ,, | ,, |
| Jan., 1963 | ,, | 18.00 | ,, | ,, | ,, | ,, | ,, | ,, | ,, | ,, |
| Jan., 1964 | 21.00 | 21.00 | 32.00 | 30.00 | 28.00 | 22.00 | 24.00 | 20.00 | 24.00 | 23.00 |
| Jan., 1967 | 29.50 | 24.00 | 41.50 | 34.00 | 36.00 | 26.00 | 32.00 | 26.00 | 31.50 | 26.00 |

[4] New York Freight Bureau (Hong Kong).

[5] Independent Lines (lowest nonconference rate shown).

The conference generally attempted to maintain its rate levels through 1962, but as more and more of the cargo carried was lost to the independent lines—especially to Sabre (which at one point carried as much as 15% of the total cargo lifted)—it decided to reduce its rates drastically to meet competition.

In the minutes of a meeting of the conference held at Kyoto, Japan, November 1, 1962, the following is recorded:

> Having regard to the conditions of instability brought into the trade by the methods adopted by non-conference lines, and having regard to the obligation of the conference towards contract shippers, it was agreed that the conference rates on the more important commodities moving in the trade should be reduced to the levels quoted by the non-conference lines, due account being taken of the rebates being paid by such carriers.

Following this meeting the conference reduced its rates to a level several dollars below Sabre's rates and approaching the lowest of the published independent rates. Sabre immediately filed a telegraphic protest with the Commission alleging that the rates had become unreasonably low and detrimental to the commerce of the United States. This proceeding was initiated soon thereafter.

By the end of 1962, Sabre left the trade and by the middle of 1963, Eddie and Thai Lines did likewise. In the case of Eddie, it appears that it was motivated as much by an increase in the tramp market as by the reduction in rates in this trade.

Beginning in April 1963, the conference increased its rate on cotton piece goods from $18 to $25 and on January 1, 1964, there was a general increase on all of the commodities involved averaging approximately 21%. The remaining four nonconference lines followed suit and raised their respective rates shortly thereafter. By January 1967, the

rates—both conference and nonconference—had increased substantially though in no instance to the levels they were in January 1962.

## Issues Presented

The primary issue in this case is the status of rates prevailing in 1962-63 under section 18(b)(5) or whether this issue has become moot.

Other issues include: whether a group of carriers whose only connection with the trade in question is through an interconference agreement should be dismissed as respondents, the legality of a tariff rule which provides for a valuable service exclusively to shippers and consignees of Chinese descent, and whether pleas of inadvertence or isolated incident are valid defenses to violations of section 18(b)(3).

## Discussion

In his initial decision, presiding examiner John Marshall concluded that all of the respondent carriers, except Sabre, charged rates which were so unreasonably low as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the Shipping Act, 1916.

He found that *all* respondent carriers in the trade have tariff provisions relating to "Chinese Merchandise" or "Chinese Provisions" which provide rates that are unjustly discriminatory to shippers not of Chinese descent and which grant an undue and unreasonable preference and advantage to particular persons and descriptions of traffic.

The examiner found Thai Lines, Ltd. to have granted rebates in violation of sections 16, 17 and 18(b)(3). The examiner also concluded that Thai Lines, Ltd., China Union Lines, Isbrandtsen Steamship Co. and Eddie Steamship Co. had charged and collected rates other than those lawfully on file with the Commission in violation of section 18(b)(3) of the Act.

As remedial action, the examiner recommended the deletion of the offending language contained in the tariffs which would grant a preference to shippers and consignees of Chinese descent and directed the collection of undercharges by those found to have violated section 18(b)(3).

This case was the first to be brought under section 18(b)(5) of the Act as amended in 1961.[6] It has continued now nearly five years, long since the cessation of the rate war in the Hong Kong-U. S. Atlantic and Gulf trade. The rate war, which was the occasion of this investigation in the first place, was over almost before this proceeding got under way. The facts of record, the costs and competitive pressures all pertain to this formerly chaotic situation. The trade has long since regained an element of stability. Because of the protracted delay due in large measure to the necessity for subpoena enforcement proceedings in the courts, we conclude that the investigation should be discontinued on the ground that it has become moot.[7]

This is not to say that in an appropriate case the Commission could not consider an 18(b)(5) case simply because the carrier or conference involved chose to increase (or decrease) its rates at the eleventh hour. However, some useful purpose must be served before the Commission will undertake to examine a carrier's now-defunct rate structure. Similarly, the Commission will not consider outdated economic evidence upon which the findings of unreasonableness and detriment to commerce must be based. However, being mindful of the futility in acting with dispatch to regulate the rates under investigation here, it is incumbent upon us to attempt to establish guidelines

---

[6] Public Law 87-346, Act of October 3, 1961, 75 Stat. 762.

[7] See, for example, the case of *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U.S.M.C. 342 (1940), which the Commission dismissed for mootness after the offending low rates had been discontinued.

and procedures for handling such proceedings with dispatch in the future.

In two previous investigations, we have embarked upon a program to establish criteria for findings under section 18(b)(5). In *Iron and Steel Rates, Export-Import,* 9 F.M.C. 180 (1965), we decided that:

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. All facts pertaining to the reasonableness of the rates are uniquely in the possession of the carriers. Unless so interpreted, section 18(b)(5) becomes a nullity and we will not impute to the Congress the enactment of a meaningless statute. The mere existence of a disparity does not necessarily mean that the higher rate is "detrimental to the commerce of the United States." The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because the rate is too high. The carrier would be required to justify the level of the rate by showing that the attendant transportation circumstances require that the rate be set at the level. Subjects of justification may include myriad ratemaking factors which might differ between the inbound and outbound rates. These include competition, volume of movement, stowage, stevedoring costs, and others. 9 F.M.C. at 191-192.

In *Outbound Rates Affecting Export High Pressure Boilers,* 9 F.M.C. 441 (1966), we formulated similar reasoning with respect to another section 18(b)(5) situation.

Following these decisions, we will attempt to establish criteria for findings under section 18(b)(5) where one carrier or conference is alleging that the rates of another

carrier or conference are so unreasonably low as to be detrimental to the commerce of the United States. The first principle which we will follow is that a rate which fails to meet out-of-pocket costs of the carrier quoting the rate is unreasonably low. By out-of-pocket costs, we mean cost of handling the cargo into and out of the vessel plus any directly assignable costs such as brokerage, etc. The problem is how a complaining carrier would establish the out-of-pocket costs of his competitor. A complaining carrier most certainly can demonstrate its own out-of-pocket costs incurred in carrying a particular commodity. We believe that such a showing establishes a presumption of the prevailing out-of-pocket costs on a particular commodity in a particular trade. It would then be incumbent upon the carrier whose rate has been challenged to rebut the presumption created by showing that his actual out-of-pocket costs and other rate factors vary materially from those developed by the complaining carrier.

This approach takes care of one aspect of such a proceeding. A complaining carrier in order to make out a case under section 18(b)(5) must also establish a prima facie showing of detriment to commerce. If the complaining carrier can demonstrate an adverse economic impact upon itself, the carrier has made out a prima facie case of detriment to commerce. Again, such proof would be subject to rebuttal by the carrier whose rates have been complained of.

In summary, a carrier may, by proving his own out-of-pocket costs, establish a rebuttable presumption of the out-of-pocket costs prevailing generally in the trade. Secondly, a carrier may show detriment to commerce by proof of some measurable adverse economic impact itself. In establishing these standards, we hopefully have avoided the pitfalls of protracted litigation which were demonstrated in this proceeding. This procedure should also place the burdens of proving facts upon those persons most capable and most readily able to prove such facts.

CHINESE MERCHANDISE

The examiner concluded that the respondent carriers—both conference and nonconference—have tariff provisions concerning "Chinese Merchandise or "Chinese Provisions" which provide "rates which are unjustly discriminatory to shippers not of Chinese descent and which grant undue and unreasonable preference and advantage to particular persons and descriptions of traffic, in violation of sections 16 First and 17 of the Act."

While it is possible that these tariff provisions could be construed in such a way as to permit the giving of a more favorable rate to shippers and consignees of Chinese descent, we find nothing in the record that such a construction was in fact made.

Although we do not hold that actual episodes of discrimination must be shown in all instances in order to find a violation of sections 16 and 17, it seems to us that where a tariff provision is only potentially capable of resulting in discrimination and where not even an allegation of actual resulting discrimination has been made, let alone any evidence of such discrimination presented, the role of the Commission should be remedial and not punitive.

The tariff rule referring to "Chinese Merchandise" used by the New York Freight Bureau (Hong Kong) in 1962 provided as follows:

C3 CHINESE MERCHANDISE

(1) Chinese Merchandise comprises all commodities essentially used by Chinese which are below ad valorem valution and which are not specified in the tariff.

(2) On shipments of Chinese Merchandise where a freight forwarding service is performed by a Chinese shipper for a Chinese consignee and the carrier is so advised by the shipper, the following fees will

be applicable and will be shown on the carrier's bill of lading as a separate item:

Payment of freight and freight forwarding fee will be collected by the carrier in accordance with Tariff Note B 1 (2). Payment of freight forwarding fee will be paid to the shipper in local currency at official rate of exchange in effect on date of shipment:

On rates assessed on a tonnage basis—$2.00 per revenue ton.

On rates assessed on a 100 lb. basis on Silk Piecegoods & Spun Silk Yarn, Silk Pongee, Raw Silk—10 cents per 100 lbs.

On Lumber & Logs—$2.00 per 1,000 bd. ft.

On Rubber—$2.00 per 50 cu. ft.

No such fees will be applicable on charges assessed on an ad valorem basis, or on rates assessed on a per package basis, or on Minimum Bill of Lading charges.

Other respondent carriers had substantially similar provosions or rules in their respective tariffs with the exception of China Union Lines, Ltd. which never had such a rule.

While we find that this rule does not lend itself to discrimination in rates, nevertheless, it is objectionable on the ground that it permits the performance of a special service to shippers and consignees of Chinese descent where such services are not available to non-Chinese shippers and consignees.

There is nothing wrong with a carrier accommodating its shippers and consignees by agreeing to perform extra services for them. A difficulty arises only when these services are not uniformly available to all shippers on an equal basis.

In the instant case the conference and most of the independent carriers agreed to collect forwarding fees from the consignees for the account of the shipper who, according to time-honored custom among the Chinese, was generally a compradore. This compradore system, according to the somewhat scanty testimony, is used almost exclusively by persons of Chinese descent. Thus, it is not surprising that the rules in the respective tariffs of the parties governing the collection of these fees were written in such a way that the service is available only to Chinese shippers performing a freight forwarding service on behalf of a Chinese consignee. Nevertheless, any privilege, facility or service which is available only to certain persons based solely upon their race, nationality or ethnic origin constitutes an unjust and unreasonable practice which is forbidden by section 17 of the Act. Where such a practice is codified into a rule the existence of the rule itself constitutes the violation. There is no need to show any actual discriminations under it.

Section 17 of the Shipping Act provides in pertinent part that:

> . . . Every carrier and every other person subject to this act shall establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Several respondents argue that there must be a showing of an actual discrimination to support a finding of violation of section 17. The plain language of the second paragraph of section 17 dictates a contrary conclusion. This paragraph of the Act is directed at "unjust or unreasonable" regulations as well as improper practices.

There is no substantial evidence of record to support any finding other than that the terms "Chinese Merchandise" or "Chinese Provisions" refer to a commodity grouping embracing Chinese-type foodstuffs.

It is a common practice to use a generic term as a commodity item where that term includes a number of related and similar commodities. However, it was not until the publication of General Order 13 [8] on May 27, 1965, that it became mandatory to list the items included in the generic term.

Since the time of the hearings both the conference and nonconference carriers have amended their tariffs so as to enumerate the particular items which are included under the generic terms "Chinese Merchandise" or "Chinese Provisions". This is in complete harmony with section 536.5(g) of General Order 13, *supra.*

Zim Israel has completely deleted its rule relating to the collection of freight forwarding fees on behalf of "Chinese shippers" and Isbrandtsen has modified its rule by simply eliminating the word "Chinese" wherever it formerly appeared, thus making this service available to all shippers on an equal basis.

We find that Rule No. 10 of the New York Freight Bureau (Hong Kong) and Rule 28(a) of Orient Overseas Line are unjust or unreasonable in violation of the second paragraph of section 17 of the Act in that they provide for the granting of a valuable service, viz. the collection of freight forwarding fees, only to shippers of Chinese descent when shipping to consignees of Chinese descent.

---

[8] 46 C.F.R. 536.5(g), 30 Fed. Register 7141, May 27, 1965.

## The Associated Lines

Nine of the carriers which were named parties respondent in this proceeding [9] have never operated in the Hong Kong-U.S. Atlantic and Gulf trade. All of these carriers are members of the Trans-Pacific Freight Conference [10] which operates from Hong Kong to U.S. West Coast ports. This conference and the New York Freight Bureau (Hong Kong) are joint signatories to the Hong Kong/North Atlantic and Gulf Joint Agreement, FMB No. 4379. This joint agreement provided *inter alia* that one conference could veto a rate action of the other and provided for transshipment arrangements among themselves. These nine lines did not participate in the hearings nor were they asked to furnish any witnesses or documentary evidence. There is no record showing of any transactions involving these carriers in the Hong Kong-U.S. Atlantic and Gulf trade. Thus, while the initial determination to name these carriers as respondents was justified on the basis of their close working relationship through the interconference agreement, *supra,* clearly there is no reason now why they should not be dismissed as respondents.

## Section 18(b)(3) Violations

In the course of the hearings several instances of charging other than the rate specified in the carriers' tariff came to light. This violates section 18(b)(3) of the Act which provides:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or

---

[9] American Mail Line, Ltd.; Java Pacific & Hoegh Line; Klaveness Line—Joint Service; Knutsen Line—Joint Service; National Development Company; Nissan Kisen Kaisha, Ltd.; P & O-Orient Lines—Joint Service; Pacific Far East Line, Inc.; and States Steamship Company.

[10] The conference itself was not joined as a party respondent.

> collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Only two of the five lines found by the examiner to have violated this section excepted to the findings (Isbrandtsen and China Union Lines) and their exceptions are by way of confession and avoidance, i.e. that the incidents found to have violated section 18(b)(3) were isolated and inadvertent occurrences.

We have no authority under section 18(b)(3) to dismiss a charge simply because it may have been an isolated violation or an honest mistake though we may couple our finding of violation with such other factual determinations as may tend to mitigate the seriousness of the offense. We see no reason to disturb the examiner's finding with respect to the section 18(b)(3) violations and they are, therefore, incorporated below in substantially the same form as found in the examiner's initial decision.

*China Union Lines*

China Union charged rates less than those on file on three shipments loaded September 5, 1962. Each shipment involved "rubber shoes" which, due to language difficulties, the carrier misclassified as "rubber products." The former was rated at $30 and the latter at $25. The total undercharges amounted to $256.50. While this was clearly an inadvertent mistake it was, nonetheless, a violation of section 18(b)(3) of the Act and it is so found.

*Eddie Steamship Co.*

Eddie charged rates less than those on file with respect to four shipments loaded February 15, 1963. Undercharges totaled $177.17. It is found that these undercharges were in violation of section 18(b)(3) of the Act.

*Isbrandtsen Steamship Co. (now American Export Isbrandtsen Lines, Inc.)*

Isbrandtsen charged rates less than those on file with respect to two shipments, one loaded March 27, 1962, and the other December 24, 1962. Here, again, these misratings were simply honest mistakes which were admitted by the carrier. They were caused by a mistaken interpretation of the carrier's Hong Kong agent as to what rate had been filed and the effective date of filing. Procedures to avoid future miscues of this nature have been adopted by this carrier. However, these must be found to be violations of section 18(b)(3).

*Thai Lines, Ltd.*

Evidence introduced by hearing Counsel, not contested by Thai, shows that during the period July 17, 1962 - May 27, 1963, Thai charged and collected rates less than those on file with the Commission on 265 shipments in the subject trade with total undercharges amounting to $24,130.31. It is accordingly found that Thai thus violated section 18(b)(3) of the Act.

REBATING BY THAI LINES, LTD.[11]

There is conclusive evidence that Thai, as a constant practice, granted rebates on shipments in this trade. On June 28, 1962, Oceanic Lloyd wrote Motorships Inc., Thai's General Agent in the United States, requesting appointment as Thai's Hong Kong agent. It enclosed a list of

[11] This portion of the report substantially adopts the conclusions and language of the examiner's initial decision except as to the section 17 violation.

its "standard" agency fees which included a fee on general cargo of 5%. The appointment was agreed to and Oceanic Lloyd prepared a written agreement and sent it to Motorships for execution. This provided that Oceanic Lloyd would receive an agency fee on general cargo of 10%. No explanation was offered and the agreement was not executed, but Oceanic Lloyd did thereafter receive a 10% fee on general cargo. However, subsequent correspondence from Oceanic Lloyd to Motorships leaves no question as to why the fee was increased. In a letter dated November 3, 1962, Oceanic Lloyd stated:

> To do this [get additional cargo for a lightly loaded vessel], we had to give away 7½% of our total commission in the form of rebates.
>
> * * * *
>
> We have a much better canvassing organization and are therefore able to obtain between 800 and 1,000 tons of cargo comprising smaller shipments. We must point out, however, that we cannot substantially exceed this figure without giving about 10% to those shippers who have over 300 tons available for shipment.
>
> From the above you will no doubt gather that under the present arrangements we can obtain about 1,000 tons per sailing, but this figure can be doubled if you are prepared to give us an additional 2% commission.

On April 29, 1963, Oceanic Lloyd wrote Motorships requesting that the rate on plastic flowers be increased from $16.50 to $17 and inquiring whether there would be any complications if the increase was put into effect on less than the 30 days' notice required by section 18(b)(2) of the Act. The letter further states:

> The reason for our requesting this increase at short notice is that other nonconference lines are no longer giving up to 15% rebates on this commodity but are only offering 10%. Their nett (sic) rate is now $16.20

(18.00 less 10%) and $16.25 (17.00 less 5% (sic)) is consequently practicable.

In a letter dated September 4, 1963, addressed to the residence of Nils O. Seim, president of Motorships Inc., Oceanic Lloyd stated:

> As you probably know, there are a number of conference signatories who ship under names of convenience in order to take advantage of the non-conference rates. You probably also know that our Freight Agent, Mr. L. C. Yew, has on many instances found it necessary to hand back certain percentages of the freight to the actual shipper. These rebates are untraceable and negotiations of this sort are made from hand to hand and there is no possibility of anything being proved as there is nothing in writing. This is the custom of the trade in Hong Kong and applies equally to ourselves as to conference members.

Seim testified as follows with regard to the general subject of rebating:

> Q. Getting back to your belief as to what is practiced in the Far East, based upon your own experience, I take it, you made the observation that you would expect that rebates were paid over there as part of this squeeze system which is a way of life?
>
> A. Yes.
>
> Q. Based upon this observation, would it be reasonable to assume that a great many of the Thai Lines shipments had been charged for at a net rate which was less than the rate on file?
>
> A. I think it is reasonable to assume that all shipments to Hong Kong are charged that way, whether it be Thai Line or any other line. To this part of the world or any part of the world.

It is found that by granting rebates Thai violated sections 16 Second and 18(b)(3) of the Act.

## Conclusions

In summary we conclude,

1. The nine carriers which are members of the Trans-Pacific Freight Conference and which did not operate in the Hong Kong-U.S. Atlantic and Gulf trade should be dismissed as parties respondent.

2. That this proceeding, insofar as it relates to the question of whether certain rates in this trade were so unreasonably low as to be detrimental to the commerce of the United States has become moot and this proceeding, insofar as it relates to this issue, should be discontinued on this ground.

3. That all of the carriers in this trade with the exception of China Union Lines had regulations relating to so-called "Chinese Merchandise" which made available special services to shippers and consignees of Chinese descent in violation of the second paragraph of section 17 of the Shipping Act, 1916.

4. That the members of the New York Freight Bureau (Hong Kong) and Orient Overseas Line still have rules in their respective tariffs which are unjust or unreasonable in violation of the second paragraph of section 17.

5. That the following carriers have violated section 18(b)(3) of the Shipping Act, 1916, by charging a rate less than that legally on file with the Commission: China Union Lines, Eddie Steamship Co., Isbrandtsen Steamship Co. (now American Export Isbrandtsen Lines) and Thai Lines, Ltd.

6. That Thai Lines, Ltd., has violated section 16 Second and 18(b)(3) of the Act by making illegal rebates.

An appropriate order will be entered.

Thomas Lisi
Thomas Lisi
*Secretary*

(Seal)

FEDERAL MARITIME COMMISSION

DOCKET No. 1083

INVESTIGATION OF RATES IN THE
HONG KONG-UNITED STATES ATLANTIC AND GULF TRADE

ORDER

The Federal Maritime Commisison instituted this proceeding to determine whether certain rates in the Hong Kong-U.S. Atlantic and Gulf trade should be disapproved under the authority of section 18(b)(5) of the Shipping Act, 1916, on the ground that they were so unreasonably low as to be detrimental to the commerce of the United States. The investigation was subsequently expanded to determine whether any of the respondents had violated sections 14, 16, 17 or 18(b)(3) of said Act. The Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference:

THEREFORE, IT IS ORDERED,

1. That respondents, American Mail Line, Ltd.; Java Pacific & Hoegh Lines; Klaveness Line—Joint Service; Knutsen Line—Joint Service; National Development Company; Nissan Kisen Kaisha, Ltd.; P & O-Orient Lines—Joint Service; Pacific Far East Line, Inc.; and States Steamship Company be, and the same hereby are, dismissed as parties respondent;

2. That this proceeding, insofar as it relates to section 18(b)(5) of the Shipping Act, 1916, as amended, be and the same hereby is discontinued;

3. (a) That Rule No. 10 of Tariff No. 23-FMC-4 of the New York Freight Bureau (Hong Kong) be and the same hereby is modified by deleting the word "Chinese" each time it appears in the first two lines of said rule and that the name of this rule be changed to "Freight Forwarding Service."

(b) That Rule 28(a) of Tariff FMC-12 of Orient Overseas Line be and the same hereby is modified by deleting the word "Chinese" each time it appears in the second line of said rule.

(c) That respondents, the members of the New York Freight Bureau (Hong Kong) and Orient Overseas Line, cease and desist from establishing, observing or enforcing any regulation or practice relating to or connected with the handling, storing or receiving of property which grants or allows the granting of any preference to any person on the basis of such person's race, nationality or ethnic origin.

By the Commission.

THOMAS LISI
Thomas Lisi
*Secretary*

(SEAL)

## APPENDIX E

### Statutes Involved

SHIPPING ACT, 1916

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commisison a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competion; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same con-

ference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel or modify each such agreement in accordance with the provisions of this section.

* * *

SEC. 18(b)(5). The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers, which after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

SUPREME COURT U. S.

FILED
MAY 12 1969
JOHN P. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

**No. 1263**

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES,

*Petitioners,*

v.

SABRE SHIPPING CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT SABRE SHIPPING CORPORATION IN OPPOSITION

LEON SILVERMAN,
VICTOR S. FRIEDMAN,
LINDA R. BLUMKIN,
*Counsel for Respondent,*
*Sabre Shipping Corporation,*
120 Broadway
New York, N.Y. 10005

STRASSER, SPIEGELBERG, FRIED & FRANK
*Of Counsel*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

**No. 1263**

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES,

*Petitioners,*

v.

SABRE SHIPPING CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT SABRE SHIPPING CORPORATION IN OPPOSITION

### Question Presented

On the basis of petitioners' Statement of the Case and the opinions of the District Court and the Court of Appeals, reprinted as Appendices A and B to the instant petition, we believe it clear that the only question presented to this Court is:

Whether the Court of Appeals for the Second Circuit abused its discretion in refusing to entertain a petition for a common law writ of certiorari under the All Writs Act (28 U.S.C. §1651(a)) seeking interlocutory review of an order of the United States District Court for the Southern District of New York insofar as it denied petitioners' motion for a stay or dismissal of this action pending a reference to the Federal Maritime Commission.

## Statement of the Case

While rejecting certain of the characterizations of respondent's actions contained in petitioners' Statement of the Case, we accept the factual statements therein as essentially correct for present purposes.

## ARGUMENT

We submit that the Court of Appeals acted well within its discretion in refusing to entertain petitioners' request for an extraordinary writ insofar as that request was predicated on the need for "primary" resort to the Federal Maritime Commission, where it is undisputed that the factual issues at bar were previously the subject of Maritime Commission proceedings spanning some five years. We submit further that even if the petition to the Second Circuit raised the issue of whether rates set contrary to the standards of Section 18(b)(5) of the Shipping Act destroy antitrust immunity,* it cannot seriously be argued

* The petition to the Court of Appeals expressly raised only the following question:

"Did the District Court err in refusing to order a stay of all further proceedings herein until the Federal Maritime

that the Court of Appeals abused its discretion in determining that resolution of this issue, a matter of statutory interpretation, was within the competence of the District Court and not a proper subject for extraordinary interlocutory appellate review. Although if the courts later reject the position taken by the District Court either on the need for prior resort to the Federal Maritime Commission or on the antitrust consequences of a violation of Section 18(b)(5) of the Shipping Act, it may be that much judicial time and effort will have been wasted in the interim, we believe it clear that the Court of Appeals correctly determined that interlocutory review was not justified. Accordingly, the petition to this Court for a writ of certiorari is ill-founded and should be denied.

---

Commission should make a determination that defendants acted outside the scope of the agreements filed with and approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916, as amended?" Petition for Writ of Certiorari to the United States District Court, Southern District of New York, p. 8.

Although respondent believes that the Section 18(b)(5) issue was encompassed by petitioner's argument in the Court of Appeals, it was thus not explicitly presented as an issue for determination by that Court.

## CONCLUSION

**For the reasons stated, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

LEON SILVERMAN,
VICTOR S. FRIEDMAN,
LINDA R. BLUMKIN,
*Counsel for Respondent,*
*Sabre Shipping Corporation,*
120 Broadway
New York, N.Y. 10005

STRASSER, SPIEGELBERG, FRIED & FRANK
*Of Counsel*

May 9, 1969

SUPREME COURT, U. S.

FILED
MAY 16 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 1263

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES,
*Petitioners,*

v.

SABRE SHIPPING CORPORATION, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONERS

PHILIP A. RYAN
BAKER & MCKENZIE
*Attorneys for Petitioners Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., and Yamashita-Shinnihon Steamship Company, Ltd.*
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

A. VERNON CARNAHAN
DONOVAN LEISURE NEWTON & IRVINE
*Attorneys for Petitioner Maritime Company of the Philippines*
Two Wall Street
New York, New York 10005

JIRO MURASE
BAKER & MCKENZIE
350 Park Avenue
New York, New York
*Of Counsel*

May 16, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

---

No. 1263

---

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES, *Petitioners,*

v.

SABRE SHIPPING CORPORATION, *Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## REPLY BRIEF FOR PETITIONERS

---

Respondent's Brief in Opposition contains a serious misstatement of fact which must be corrected if Respondent's argument that the Court of Appeals denial of relief was not an abuse of its discretion is to be properly evaluated by this Court.

Respondent states (p. 2) "it is undisputed that the factual issues at bar were previously the subject of Maritime Commission proceedings spanning some five years." This implies that the Commission had before it the critical issues under Section 15 upon the resolution of which Petitioners' antitrust immunity depends. Respondent knows very well that Section 15 issues were not before the Commission and it impedes proper review of this case for Respondent to imply that they were.

Contrary to Respondent's statement, it is undisputed that factual issues under Section 15 in the treble damage action were not before the Commission in its Section 18(b)(5) investigation.* Respondent must necessarily concede this to be true.

With the factual road thus made straight, review by this Court of the exercise of discretion by the Court of Appeals must be illumined by the principle stated in *Union Tool Company* v. *Wilson,* 259 U.S. 107, at 112:

> ". . . [L]egal discretion . . . does not extend to a refusal to apply well-settled principles of law to a conceded state of facts."

In this case, the facts as to Section 15 issues being conceded, Petitioners submit that the ambit of discretion has been reduced to zero by this Court's holdings in *U. S. Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474, *Far East Conference* v. *U. S.,* 342 U.S. 570, *Fed-*

---

* Judge Ryan's opinion in the District Court makes it clear that Section 15 was not included in the Commission's order of investigation in Docket 1083. Petition pp. 1b *et seq.*, and in particular p. 17b, note 2. See also Petition p. 14.

*eral Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-499, and *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213.

Respectfully submitted,

PHILIP A. RYAN
BAKER & MCKENZIE
*Attorneys for Petitioners Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., and Yamashita-Shinnihon Steamship Company, Ltd.*
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

A. VERNON CARNAHAN
DONOVAN LEISURE NEWTON & IRVINE
*Attorneys for Petitioner Maritime Company of the Philippines*
Two Wall Street
New York, New York 10005

JIRO MURASE
BAKER & MCKENZIE
350 Park Avenue
New York, New York
*Of Counsel*

May 16, 1969